Supreme Court, U. S.
FILED
OCT 7 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY, a Corporation,
Petitioner,

vs.

LILLIAN M. MATISE, as personal representative of
GRANVILLE C. MATISE, deceased,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Petitioner, regretfully, must demur to the excessive number of statements in Respondent's Brief which are beyond or outside the record (a number which is not explainable by zeal or accident) compounded by the inclusion in the Appendix, against Petitioner's protest, of the material at Appendix pages 37 through 45, which is not evidence of record.

ARGUMENT

I. AN IMPROPER DEDUCTION OR WITHHOLDING FROM WAGES DOES NOT ALONE ESTABLISH THE ABSENCE OF SUFFICIENT CAUSE WITHIN THE MEANING OF TITLE 46 USC § 596.

Respondent's brief erroneously argues that "if the withholding results from a deduction forbidden by law—that fact *alone establishes the absence of sufficient cause for making it.*" (Respondent's Brief in Opposition p. 6). This argument is contrary to the express language of the statute and of this Court's decisions.

Respondent would have this Court delete from the statute the phrase "without sufficient cause", in all cases where there is a partial non-payment of wages. In order to de-emphasize the direct conflict with this Court's decisions, Respondent urges the (specious) ground of distinction that the shipowner acting reasonably and in good faith is protected against the penalty by the "without sufficient cause" wording in a case of total non-payment of wages, but not in a case of only partial non-payment. It is true that if everything has been done precisely as it is finally determined the law requires, as in this case the shipowner and the trial court in the first instance concluded and found—a finding certainly not clearly erroneous within the rule of *McAllister v. United States* (1954) 348 U.S. 19—the question of "sufficient cause" is not reached. (App.p.9).

This Court has previously rejected the basic contention put forward by Respondent in *Collie v. Fergusson* (1930) 281 U.S. 52, 55 in which this Court held and stated:

> "The phrase 'without sufficient cause' must be taken to embrace something more than valid defenses to the claim for wages. Otherwise it would have added nothing to the statute . . . The words connote either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment."

Respondent's suggestion that the rule of *Collie* is to be distinguished because that case involved total, not partial, non-payment is not to be taken seriously. The technical determination of the propriety of a deduction from wages, or of an attempt to pay wages in the unusual circumstances of this case, does not, in and of itself, establish the absence of sufficient cause for what is ultimately determined to be a non-payment. See *Isbrandtsen Co. v. Johnson,* 190 F.2d 991, 993 (3rd Cir. 1952) affirmed 343 U.S. 779 (1952); *Swain v. Isthmian Lines, Inc.* 360 F.2d 81 (3rd Cir. 1966); *McCrea v. United States* (1936) 294 U.S. 23, and *Escobar v. American Transportation Co.,* 503 F.2d 271 (9th Cir. 1974) [Petition for Certiorari now pending under Docket No. 74-1184]. It is respectfully submitted that Respondent's argument is erroneous and untenable.

II. AN UNCONSCIONABLE AWARD TO A SEAMAN (WITHOUT ANY WILLFULNESS OF THE SHIPOWNER HAVING BEEN SHOWN) CAN ONLY BE AVOIDED BY THE JUDICIARY'S EXERCISE OF DISCRETION.

Respondent's suggestion that a shipowner, faced with a claim arising under section 596, seek declaratory relief, although novel, is wholly without statutory or decisional support.

It is uncertain whether Respondent suggests that shipowners institute a declaratory relief action in connection with every sign off by seamen from shipping articles, and in any event the suggestion would duplicate in function the protection provided seamen by the comprehensive provisions of the Seamen's Relief Act, of which 46 U.S.C. §596 is included, for the active participation of impartial governmental officials (Shipping Commissioners in the United States and Consular officers abroad) at every stage of a seaman signing on articles and being paid off, with all of which Petitioner complied fully.

Respondent's other suggestions, that the shipowner either pay the disputed amount or make a deposit into court are equally ineffective as acceptable solutions to the problem which one aspect of this case presents in its classic form, namely, the unconscionable result of permitting penalties to accrue, day-by-day, as sought by Respondent, during periods which might be very extended but not bar an action on the ground of laches. It is admitted (p. 3 of Brief for Respondent) that the seaman was not aware that there was a legal basis for seeking recovery (double payment) of the $510.00 advanced in Saigon, and the possibility of penalty, "for several months". Thus, it is Respondent's position, with which the Court of Appeals below agrees, that Respondent should recover the double wage penalty for each of the 175 days which elapsed between March 24, 1969 until counsel's letter to the shipowner of September 10, 1969, a period during which both the shipowner and the seaman thought everything had been done properly. In such circumstances, there is nothing, even under Respondent's

suggestions, which an American shipowner could do to protect itself, and it is obvious that the permitting of two-for-one penalties to accrue during such a period with the resulting windfall bonanza to the occasional seaman exacted from the remnants of the American Merchant Marine serves no purpose of the statute or of public policy.

It is submitted that the mechanistic result sought by Respondent is irrational, is not required by the words of the statute and the absurd consequences urged by Respondent should not be read into it (*Guaranty Trust Co. v. United States* (1938) 304 U.S. 126), particularly where the Congress for over a period of 59 years has done nothing to set aside the "rule of reason" which this Court established in *Pacific Mail SS Co. v. Schmidt* (1916) 241 U.S. 245 (this is a "deduction case" within Respondent's terms of reference) and was followed by the lower courts [cf. *Mystic S.S. Co. v. Stromland,* 21 F.2d 607 (4th Cir., 1927)] until a few recent aberrant cases, of which the present case is an example. See *United States v. Elgin J. & E.R. Co.* (1936) 298 U.S. 492.

CONCLUSION

If the Court does not grant Petitioner's prayer for an outright reversal ordering that judgment be entered in its favor, it is respectfully submitted that the judgment of the Court of Appeals below should be reversed with instructions to remand the case to the Trial Court to determine whether the failure to pay $510.00 which was

advanced to the seaman for air transportation was without sufficient cause and if it is found that it was, the period of time, if any, during which the penalty should be deemed to have accrued.

Respectfully submitted,

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Date: October 6, 1975